



**ESSAY QUESTIONS AND SELECTED ANSWERS
JUNE 2020
CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the four essay questions from the June 2020 California First-Year Law Students' Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Torts
2.	Contracts
3.	Criminal Law
4.	Torts

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 1

Mel was late for an important meeting with his supervisor one evening and was driving at least 35 miles an hour on a residential road. The posted speed limit on this road was 30 miles per hour.

As Mel rounded a curve in the road, Nigel suddenly backed out of his driveway in front of Mel. Mel's headlights were on, and his lights would have been visible if a driver had looked carefully. To avoid hitting Nigel's car, Mel both braked hard and turned into the center of the street, crossing a yellow (no passing) line and partially entering the lane of oncoming traffic. Even if he had been going substantially slower, he would have had to take these actions to avoid hitting Nigel.

Otto was driving towards Mel while adjusting his car radio. As a result, Otto did not see Mel in time. Had he been attentive, he likely could have avoided an accident. Instead, the two cars collided, left the road, and plowed into Penny who was walking on the sidewalk. Nigel's car was not touched. Penny was seriously injured.

1. What claim or claims can Penny reasonably raise against Mel; what arguments can Mel reasonably make; and what is the likely outcome? Discuss.
2. What claim or claims can Penny reasonably raise against Otto; what arguments can Otto reasonably make; and what is the likely outcome? Discuss.
3. What claim or claims can Penny reasonably raise against Nigel; what arguments can Nigel reasonably make; and what is the likely outcome? Discuss.

QUESTION 1: SELECTED ANSWER A

Penny v. Mel

Negligence

Prima facie case: All persons owe a reasonable duty of care to others to avoid breaching that duty, avoiding causation, harm, and resultant damages.

Negligence consists of a duty, breach, causation and damages.

All persons owe a reasonable prudent person duty of care to another.

Here, Mel's duty was to drive safely at all times as would a normal, reasonably prudent person would do. The facts state that Mel was driving over the speed limit.

Negligence per se

Negligence per se occurs when one breaks a statute designed to protect someone from the type of harm contemplated by the statute, the statute is broken, and harm results.

Duty: Here, Mel was driving over the speed limit. This is a violation of the statute. The statute was intended to protect from harm resulting from speeding. In this case, we have facts that indicate that Mel was driving "at least 35 miles an hour" so it is unclear as to whether or not Mel was excessively speeding. However, per se, the statute was violated. The question now turns to whether or not Penny was an intended beneficiary of this statute such that she is protected by it. It could be argued that she is and that this accident was caused by Mel's speeding. However, the facts indicated that the primary cause of the accident was *not* Mel's speeding, but rather his collision with Otto.

Thus, Mel has breached this duty.

Breach

There is a breach of the statutory duty to drive the speed limit.

Thus, this element is met.

Cause

Actual - But for Mel's speeding, the accident would not have occurred. This is highly debatable because there are no facts to indicate that Mel's speeding caused this accident.

Thus, there is likely no actual cause.

Proximate Cause - Was it foreseeable that Mel's speeding would cause the accident? Here, there are no facts to indicate that Mel's speeding causing an accident was a foreseeable outcome in this fact pattern. Additionally, the facts state that speed was not a factor, further supporting this argument.

Thus, there is likely no proximate cause.

Damages

The facts indicate that Penny was seriously injured. This would likely lead to general and special damages, should Penny prevail on her claim under a negligence per se theory.

There is likely no recovery for Penny under a negligence per se theory.

General negligence - duty

Here, Mel was driving over the speed limit and based on the listed facts, was not otherwise engaged in any actions that would violate the duty as a reasonably prudent person. Reasonably prudent people drive slightly over the speed limit all of the time in life, and rarely do accidents

result from this. Additionally, the facts do not indicate that speed was a factor.

Breach

Mel, based on the facts, was speeding. This is a potential breach of his duty to drive as a reasonably prudent person would. However, as discussed supra, this would be a negligence per se violation, which is likely ruled out. Additionally, the facts state the speed was not a factor in the accident.

Mel crossed the yellow line (no passing). This is likely a breach of his duty as a reasonably prudent driver. However, there is an exception for this duty. In order to avoid harm, a person may breach their duty of a reasonably prudent person. Here, Mel attempted to avoid the harm of hitting Nigel's vehicle backing out his driveway. There are no facts to support that Mel saw Otto's oncoming vehicle.

Actual Cause

But for Mel's crossing the yellow line, there would have been no accident.

Thus, there is actual cause.

Proximate Cause

It was generally foreseeable that crossing the yellow line could result in an accident. However, the facts do not state that Mel saw Otto's oncoming car, and thus it would be hard to prove that was foreseeable.

Thus, it is unlikely that there is proximate cause.

Alternative causes discussed infra.

Substantial factor cause: Mel will likely argue that he is excused from being a substantial factor

in this accident for the reasons discussed infra under Alternative Causes.

Damages

Penny will seek to recover general and special damages. If Mel is successful in arguing that there was no proximate cause, her argument will fail.

Defenses

Exigency

Mel will argue that to avoid the harm of hitting Nigel's car, he did not breach his duty to Penny and thus should not be held liable.

Mel will likely win this argument.

Comparative Negligence

Comparative negligence has two forms: pure, where the plaintiff may collect regardless of defendant's fault if defendant has any fault; and modified, where the plaintiff may not collect if Plaintiff was 50% or more at fault (more than the defendant's fault).

There are no facts to indicate that Penny was in any way negligent, so any argument Mel may make related to comparative negligence will likely fail.

Contributory Negligence

Contributory negligence bars the plaintiff from any recovery if the plaintiff is at fault in any way.

There are no facts to indicate that Penny was in any way negligent, so any argument Mel may make related to comparative negligence will likely fail.

Last Clear Chance

The last clear chance allows the Plaintiff to overcome a bar to recovery if the defendant had the

last clear chance to avoid the harm.

There are no facts to support that the defendant had the last clear chance to avoid the harm.

Alternative Causes

While this would typically fall under the substantial factor test in the causation arena, here Mel may try to use this should he be found liable to argue that he, Otto, and Nigel should have to prove up who was really at fault.

In this argument, Mel will likely succeed.

Therefore, for the reasons discussed supra, Mel will likely not be found liable for Penny's injuries.

Penny v. Otto

Negligence - discussed supra.

Duty - discussed supra.

Here, Otto has a duty to drive as a reasonably prudent person. Adjusting his car's radio presumably took his eyes off of the road, thus causing him not to see Mel in partially oncoming traffic.

Thus, Otto has breached his duty of reasonable care.

Causation

Actual cause - but for Otto's inattention in looking at his radio, there would have been no accident.

Thus, there is actual cause.

Proximate Cause

It was foreseeable that, by not paying attention to the road and to traffic, an accident could result, and in fact, an accident did result.

Thus, there is proximate cause.

Substantial factor: Otto may argue that he was not the substantial factor in this accident. Here, Otto was not paying attention by adjusting his radio, which caused him not to see Mel, which was a substantial factor in this accident. However, if Mel is successful in his exigency argument, Otto will likely lose on this issue.

Thus, Otto will likely be found to have been contributing to the substantial factor in this accident.

Concurrent cause where two defendants cause harm where either alone would have caused the harm, both are liable.

Here, Penny may argue that Otto's actions alone would have caused the accident, and so he would be liable.

Thus, Penny is likely to prevail on this point.

Alternative cause: discussed infra.

Defenses

Assumption of the Risk

Assumption of the risk occurs when the plaintiff knowingly takes the risk knowing of the potential harm.

Here, there are no facts to support this, based on the exigency.

Otto may argue that Mel assumed the risk by crossing the yellow line. While Mel did cross the

yellow line, Mel has a plausible excuse. The trier of fact will have to determine whether Mel actually assumed the risk vs. his exigency.

It is unlikely, for the reasons discussed supra that Otto will be successful in his defense of shifting blame to Mel under a theory of Assumption of the Risk.

Contributory Negligence, rule supra.

Otto may argue that Penny was contributory negligent. There are no facts to support this assertion.

Thus, Otto is likely to fail in this defense of his liability.

Comparative Negligence, rule supra.

There are no facts to support that Penny was comparatively negligent.

Thus, Otto is likely to fail in this defense of his liability.

Therefore, Otto is likely to be found liable for Penny's injuries and resulting damages.

Penny v. Nigel

Negligence defined supra.

Duty

Nigel had a duty to be attentive when pulling out of his driveway.

Breach

His failure to see Mel's vehicle, when the facts state that Mel's lights were on and that Mel's vehicle would be visible to a driver paying careful attention would seem to indicate that Nigel breached his duty of careful, attentive driving.

Actual cause

But for Nigel's pulling out of his driveway, Mel would have had to partially swerve into oncoming traffic, and the resulting collision with Otto's vehicle would not have occurred.

Thus, there is actual cause.

Proximate cause

It was foreseeable that not paying attention when backing out of a driveway (particularly since backing out typically has more risk than pulling out forward), an accident would occur.

Thus, there is proximate cause.

Substantial factor

Here, Nigel's backing out of the driveway was a substantial factor in the accident as it set in motion the chain of events that led to the resultant accident.

Thus, Nigel was a substantial factor in this accident, and to the cause of harm of Penny.

Concurrent defendants - discussed supra.

Here, Nigel's backing out of his driveway alone caused Mel to swerve. There is a question about whether Mel and Otto would have struck Penny had they not collided. A trier of fact would have to make this determination.

Thus, given these facts, Penny may be able to prevail on proving that Nigel is a concurrent defendant.

Alternative Causes - rule discussed supra.

Here, there are three possible defendants. The defendants are likely to pursue a theory of alternative causes in an attempt to counter Penny's burden shifting to them. Based on the facts and analysis supra, it is likely that at least two defendants will have liability and that Penny will

be able to prove up damages against them.

Thus, Penny will likely be able to prove up damages against at least two defendants after the defendants' burden shift.

Defenses

Contributory negligence rule supra

Nigel may try to prove contributory negligence by Mel.

Nigel will likely not succeed based on the facts and Mel's own defense.

Contributory negligence by Otto rule supra.

Nigel will likely try to prove that Otto was contributorily negligent. Given the facts, and Otto's own likely negligence, discussed supra, Nigel may be able to prove this.

Thus, Nigel may be able to prove contributory negligence by Otto.

Contributory negligence by Penny rule supra.

There is no evidence in the facts that Penny was contributorily negligent.

Thus, this argument will likely fail.

Comparative Negligence

Nigel may try to show that Mel was contributorily negligent. However, there are no facts to support this, particularly given Mel's defenses.

Thus, Otto will likely fail in this argument.

Comparative Negligence - Otto rule supra.

Discussed supra (comparative negligence, Otto).

Damages

Penny will likely recover general and special damages from Nigel.

Damages

Penny can reasonably raise

General damages against Otto. Penny is likely to prevail for the reasons discussed, supra.

Special damages against Otto. Penny is likely to prevail, for the reasons discussed, supra.

Like Mel, Otto may try to escape complete liability by arguing for alternative causes, discussed supra. Should he argue this, Mel is likely to prevail and Otto is likely to be liable.

QUESTION 1: SELECTED ANSWER B

PENNY V. MEL

NEGLIGENCE

Negligence is where the defendant breached his duty of care to plaintiff which actually and proximately caused the plaintiff damages.

DUTY

There is a general duty owed to all foreseeable plaintiffs. The general standard of care is measured by how a reasonably prudent person would act under the same or similar circumstances.

Mel had the duty to act as a reasonably prudent person to all foreseeable plaintiffs. He had the duty to operate his car so as to avoid creating an unreasonable risk of harm to the people around him.

Therefore, Mel owed a duty

SPECIAL DUTY

NEGLIGENCE PER SE

A statute may impose a special duty of care where the type of injury is part of the class which the statute is intended to protect against and the plaintiff is within the class of people intended to be protected by the statute. Negligence per se proves both duty and breach.

Here, the posted speed limit was 30 miles per hour. The speed limit is posted in order to prevent harm to pedestrians and road users that may be caused by uncontrollably fast vehicles.

Penny was part of the class of people intended to be protected since it says in the facts that

Penny was walking on the sidewalk, making her a pedestrian that is within the risk created by speeding. Additionally, Penny may assert that crossing a yellow line (no passing) is a breach of a statute and the statute was put into place for the purpose of preventing injury to people like Penny and to prevent the type of injury Penny suffered, as discussed above. Penny was seriously injured from the two cars plowing into Penny, which is the type of harm intended to be protected against, therefore negligence per se applies to both the speed limit and the yellow line.

Therefore, Mel owed a duty under negligence per se.

BREACH

Breach is the failure to conform to the duty.

Penny will argue that Mel was driving "at least 35 miles an hour" which was above the posted speed limit and she swerved partially onto on-coming traffic through the yellow line; therefore Mel acted unreasonably and breached the duty owed to Penny. However, Mel will counter that she had her headlights on and was acting reasonably when driving 35 miles per hour. He will argue that even if he was not speeding, he would have crossed the line either way since the facts state that even if he had been going substantially slower, he would have had to take these actions to avoid hitting Nigel.

Therefore, Mel is likely to prove that he did not act unreasonably and therefore did not breach his duty.

ACTUAL CAUSATION

Actual causation is the but for cause of the injury.

Here, but for Mel's actions of crossing over the yellow line, Penny would not have been hurt.

Therefore, there is actual causation.

PROXIMATE CAUSATION

The injury must be a foreseeable consequence of the breach, with no intervening or superseding causes.

Here, Penny will argue that it is foreseeable that crossing over the double line will result in injury to pedestrians within the area and other motorists. Mel may argue that Otto's actions were an intervening and unforeseeable cause that broke the chain of causation. However, crossing into the on-coming traffic makes it foreseeable that he will collide with the cars coming in the opposite direction.

Therefore, there is proximate causation

DAMAGES

Penny suffered damages because the facts state that "Penny was seriously injured." Penny may recover her general pain and suffering along with her special damages which include her medical expenses and lost income.

DEFENSES

PRIVATE NECESSITY

Necessity is a defense where the defendant acted to avoid a greater risk of harm to himself or to another.

Mel will argue that to avoid colliding with Nigel's car, which suddenly backed out of the driveway, he had to swerve and cross the double lane. However, Penny will argue that he did not avoid a greater risk of harm since driving onto oncoming traffic is not a safer option than colliding with Nigel's car that was only backing out of the driveway. Furthermore, cars going in

the opposite direction are likely to be traveling much faster than the car that is backing out of the driveway.

Therefore, this defense will not work.

EMERGENCY

Mel will argue that the situation was an emergency and he could not have acted any other way but to swerve onto on-coming traffic evidenced by the fact that Mel would have acted the same way even if he was driving at a substantially slower rate.

Mel's defense of emergency may prevail.

CONTRIBUTORY NEGLIGENCE

If the plaintiff's negligence contributes to the resulting injury, under common law, the plaintiff's injury was barred unless the defendant had the last clear chance to avoid the injury.

Here, there are no facts to suggest that Penny was negligently walking down the sidewalk; therefore this defense is unlikely to succeed.

COMPARATIVE NEGLIGENCE

If the plaintiff's negligence contributes to their own harm, the damages will be reduced by the proportion of their own negligence.

As discussed above, Penny was not negligent.

Therefore, comparative negligence will fail as a defense.

ASSUMPTION OF THE RISK

If the plaintiff voluntarily encounters a known risk of harm, she is barred from recovering.

There are no facts to indicate that Penny assumed the risk.

Therefore, this defense will fail.

PENNY V. OTTO

NEGLIGENCE

supra.

DUTY

supra.

Otto had the duty to act reasonably under the circumstances as a reasonably prudent person.

BREACH

supra.

Otto breached his duty by looking down at his dashboard to change the music. Otto will argue that it is not unreasonable to occasionally glance at the radio or his dashboard to change the music.

Otto will most likely prove he did not breach his duty; however if Penny proves that Otto breached, then we must move onto proving causation.

ACTUAL CAUSATION

supra.

But for Otto adjusting the radio, he would have reacted fast enough to avoid the collision and injury to Penny.

Therefore, there is actual causation.

PROXIMATE CAUSATION

supra.

It is foreseeable that being inattentive to the road will lead to not enough time to react to sudden changes in the road, such as a car coming directly towards you. Otto will argue that Mel's car driving towards him was an unforeseeable intervening event which breaks the chain of causation because it is the negligent conduct of a third party. Penny will counter that negligence of third parties are always foreseeable and that Penny's injuries were a foreseeable consequence of Otto's breach. Additionally the facts state that "had he been attentive, he likely could have avoided an accident."

Therefore, there is proximate causation

DAMAGES

supra.

DEFENSES

CONTRIBUTORY NEGLIGENCE

supra.

COMPARATIVE NEGLIGENCE

supra.

ASSUMPTION OF THE RISK

supra.

PENNY V. NIGEL

NEGLIGENCE

supra.

DUTY

supra.

Nigel owed a duty to act as a reasonably prudent person under the circumstances.

BREACH

supra.

Nigel breached his duty of care when he backed out of his drive way without looking for any cars coming his way. The facts state that Mel's headlights were on and it would have been visible to a driver if the "driver had looked carefully." Nigel did not act as a reasonably prudent person since a reasonably prudent person would have checked to see whether there are any cars in danger of being hit by their act of backing out of their driveway. Because of Nigel's sudden backing out of his driveway without looking carefully, it can be shown that Nigel breached his duty to act reasonably.

Therefore, Nigel breached his duty.

ACTUAL CAUSATION

supra.

But for Nigel suddenly backing out of his driveway without being attentive, he would not have caused Mel and Otto to collide into Penny.

There is actual causation.

PROXIMATE CAUSATION

supra.

It is foreseeable that backing out of a driveway without checking to see if anyone is driving his direction will cause the cars coming that way to swerve and cause a collision, which will cause injuries. Nigel will argue that Otto's negligence is a superseding cause that is independent and unforeseeable; however Penny will counter that the mere negligence of third parties that result purely from Nigel's negligence is foreseeable and that Otto's negligence is dependent on Nigel's initial negligence since Otto would not have collided into Mel if Nigel had not backed out without looking for any on-coming drivers.

Therefore, there is proximate causation.

DAMAGES

supra.

DEFENSES

CONTRIBUTORY NEGLIGENCE

supra.

COMPARATIVE NEGLIGENCE

supra.

ASSUMPTION OF THE RISK

supra.

CONCLUSION

Penny will likely be successful in a negligence claim against Nigel, but will most likely fail in her

claims of negligence against Mel and Otto.

ESSAY EXAM INSTRUCTIONS

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QUESTION 2

Seller is a merchant in the business of making fine guitars, which are sold to retail dealers at wholesale prices through an online catalog. Buyer is a merchant who owns a retail music store that sells numerous brands of various stringed instruments.

Buyer emailed Seller asking that ten Model A guitars be delivered to Buyer at the wholesale price of \$5,000 each as listed in the catalog. The next day, Seller emailed an invoice for \$50,000, stating (i) that delivery would be made within 14 days, (ii) that any complaints about the condition or quality of the guitars, and/or return requests, must be made within 10 days of delivery, and (iii) that payment is due on delivery. Those three provisions are customary in the musical instrument industry.

Buyer received the invoice, but did not respond. The guitars were delivered to Buyer 11 days later, but Buyer sent no payment to Seller. Two weeks after the instruments were delivered, after having had several customers buy other guitars instead of the Model A, Buyer sent an email to Seller stating, "These guitars do not satisfy my customers' needs. Therefore I am not paying for them. I am returning them at my expense."

Seller sued Buyer for breach of contract.

What arguments will Seller make in support of her claim; what defenses will Buyer assert; and what is the likely outcome, including what remedies, if any, can Seller expect if her claim succeeds? Discuss.

QUESTION 2: SELECTED ANSWER A

Governing Law

The UCC governs all transactions for the sale of goods, which are moveable and tangible items.

Common law governs all other transactions.

Here, guitars are the subject matter of the transaction, which are goods. Therefore, the UCC applies.

Merchants

Merchants are those who regularly deal in goods of the kind involved in the transaction or hold themselves out to have special knowledge of such goods.

Here, Seller is a merchant in the business of making fine guitars, and buyer is a merchant who owns a retail music store. Therefore, both parties are merchants and will be held to a higher standard of good faith and fair dealing.

Contract Formation

A contract is an exchange relationship, between two or more parties, containing at least one promise, enforceable by law. A valid contract consists of an offer, acceptance, consideration and no defenses.

Offer

An offer is a manifestation of present contractual intent to be bound to certain and definite terms, communicated to the offeree.

Seller's Online Catalog

Here, Seller publishes an online catalog with wholesale prices for guitars. This is likely an advertisement or invitation to deal and not a valid offer since quantity is not specified until a prospective buyer responds to the catalog. Under the UCC, quantity and subject matter are required for a valid offer.

Buyer Email

Here, Buyer emailed Seller asking that 10 Model A guitars (quantity and subject matter) be delivered to buyer at a price of \$5000 each as listed in the catalog. This is a valid offer from Buyer communicated to Seller, the offeree.

Acceptance

Acceptance under common law must be a mirror image of the offer. Acceptance under UCC is any reasonable manifestation of assent, even if it contains different or additional terms unless the offer limits acceptance to the terms of the offer.

Seller's Invoice

Here, the next day Seller seasonably emailed an invoice for \$50k (for 10 guitars at \$5k each as in the offer) stating that delivery would be made within 14 days, any complaints must be made within 10 days of delivery, and that payment is due on delivery. These last three provisions were additional terms, but do not negate the Seller's valid, reasonable acceptance of Buyer's offer. Therefore, there is valid acceptance.

Consideration

Consideration is bargained for exchange that induces performance and is binding on both parties.

Here, Buyer agrees to exchange \$50k for 10 Model A guitars. Therefore, there is valid consideration.

Defenses to Formation

Statute of Frauds

Certain contracts are required to be in writing signed by the party against whom the contract is to be enforced to be valid.

Here, because the contract is for the sale of goods worth \$500 or more, the contract must be in writing to be enforced. Buyer's email with electronic identification markers and Seller's emailed invoice with electronic identification markers will suffice for signed writings in congregate. Therefore, these writing satisfy the Statute of Frauds.

Contract Terms

Battle of the Forms

Under UCC 2-207, where both parties are merchants, additional terms become part of the contract unless offer limits acceptance to terms of the offer, offeree objects within a reasonable time, or the terms materially alter the contract. Under the majority knockout rule, different terms are knocked out of the contract and replaced with a UCC gap filler. Under the minority rule, different terms are treated as additional terms.

Here, Buyer did not limit acceptance to the terms of his offer, and since he did not respond to the invoice, he did not object to the additional terms within a reasonable time. The delivery within 14 days provision and the payment due upon delivery provision do not materially alter the contract, therefore they will become part of the contract. Buyer will argue that since the provision for returns within 10 days of delivery altered his rights and remedies, it materially

altered the contract and therefore should not be enforced. Seller will argue that the term did not materially alter the contract. Because the term likely does limit remedy and resolution, it will not become part of the contract because it is a material alteration. However, if a UCC gap filler is inserted, it will likely be influenced by the customary usage of trade, discussed supra. However, since Seller contacted buyer for a refund at 14 days, this will likely satisfy any UCC gap filler used.

Interpretation

Contract terms are interpreted according to their plain and express meaning in the contract, followed by course of performance, course of dealing, and usage of trade.

Here, Seller will point to the fact that the contract provision for return requests within 10 days is a standard and customary provision in the music industry and therefore should be enforced. This may be persuasive, but since the Buyer contacted seller only 4 days past the contractual time limit and since the guitars were delivered three days early therefore making the return request only one day after the constructive absolute time limit, this argument likely will not prevail.

Unconscionable

A contract or provision will not be enforced if it shocks the conscience of the court.

Here, Buyer will argue that enforcing the 10 day rule for return would be unconscionable because it is unreasonable to assume that she had time to inspect the quality of the guitars fully before 14 days. This argument likely will not succeed.

Ambiguity

A contract term has more than one meaning.

Here, Seller will argue that the quality and condition provision does not include customer "satisfaction"; therefore, Buyer has no grounds to return. However, the Buyer will likely prevail on the argument that quality and condition include "satisfaction" within the meaning so the term is not ambiguous and should not bar her from seeking a refund in good faith.

Condition

A condition is an event not certain to occur which must occur before performance becomes due.

Here, Buyer will argue that her satisfaction is an implied condition of her duty to pay. However, there was an express condition in the contract that Buyer had a duty to pay on delivery which Seller did not waive. Buyer would still have had the ability to reject the goods after payment once a reasonable inspection was made.

Breach

A breach is a failure to perform an absolute duty of a contract that has not been discharged.

Here, Seller will argue Buyer breached the duty to pay on delivery once Seller perfectly tendered the guitars as contracted. Further, Buyer did not respond that the quality of the guitars was not satisfactory within the contractual time and since there were no actual quality issues, simply not satisfying customer needs, this quality claim was not made in good faith.

Since this term is likely not ambiguous and since the contract provision does not put limits on what constitutes quality and condition, this is likely not a breach. Since this provision may not be enforced because it materially altered the contract, and since the Buyer notified the seller only 14 days later which will likely be within the bounds of any reasonable UCC gap filler, Seller likely will not prevail on this argument.

Compensatory Damages

Compensatory damages include expectation damages to give the plaintiff the benefit of his bargain as well as any incidental or consequential damages that are reasonably foreseeable at the time of contracting. A plaintiff must mitigate damages.

Here, if Seller's contract provision for a 10-day return policy were to be enforced because it was customary in the music industry and found to not materially alter the contract, Seller would be entitled to the expectation damages as a lost volume of the difference between the contract price and the retail price (lost profits), as well as any foreseeable incidental and consequential damages incurred in finding a substitute contract with another buyer.

QUESTION 2: SELECTED ANSWER B

UCC controls

Offer - Buyer offers to purchase 10 Model A at \$5,000 each. Valid offer. Offer was in writing, an email. (SOF satisfied)

Acceptance - Seller emailed confirmation invoice \$50,000, Valid acceptance.

*Discuss Varying Terms after formation analysis.

What are merchants? What terms control

Buyer did not respond to the varying terms, so they become part of the contract.

Seller v Buyer

Controlling law. This is a contract for the sale of guitars. The UCC controls the **sale of goods**. Goods are those items that are moveable at the time of identification to the contract. Guitars are moveable at the time of identification to the contract. Therefore, under the UCC guitars would be considered goods. The UCC controls contracts for the sale of goods, therefore the **UCC controls this contract**.

To be enforceable, a contract requires mutual assent - a valid offer and acceptance - as well as consideration.

Offer. An advertisement, generally speaking, is not considered an offer, being that it does not include the quantity of goods available nor does it identify the offeree. Here, Buyer emailed Seller asking them to deliver 10 Model A guitars at the advertised price of \$5,000 each. This constitutes a valid offer, and it identifies the subject matter as well as the quantity. It also

includes the price, though, that is not a required term under the UCC.

Acceptance. Seller accepted the offer by their reasonable expression of acceptance, when they emailed buyer with the invoice, confirming the order, as well as other varying/new terms which will be discussed below. Additionally, in the absence of an express acceptance, the promise to ship or the actual shipment of goods acts as acceptance, under the UCC. Here, Seller did ship the goods, and this would have acted as valid acceptance had the Seller not already emailed the Buyer with their acceptance.

Consideration. Consideration requires a bargained for exchange, a legal detriment to each party making a promise. Here, we have such valid consideration; the Buyer is offering \$50,000 in exchange for 10 Model A guitars.

Given the above mutual assent and consideration, we have a valid formed contract between Buyer and Seller.

Which terms control the contract? If either the buyer or seller were not a merchant, then the **mirror image rule** would apply and any new or differing terms in the acceptance would act as a counter offer/rejection. A merchant is a person that deals in good of the kind which are the subject matter of the contract. The facts tell us that **both**

Seller and Buyer are merchants of guitars.

Given that both parties are merchants, the UCC has a rule that addresses new or differing terms. When an acceptance includes such terms, they will become part of the contract unless they materially alter the contract, are expressly not permitted by the terms of the offer (the offer expressly allows for only acceptance of the terms of the offer), or unless the offeror rejects the new or different terms within a reasonable time. Here, the Seller included on their

acceptance new terms, those being that delivery would be made within 14 days, that any complaints about the condition or quality of the guitars and/or return requests would be made within 10 days of delivery, and that payment was due upon delivery. The offer did not expressly limit acceptance to the terms of the offer, the Buyer did not reject these terms at any time, and these terms do not appear to materially change the terms of the offer. UCC takes trade practice into account, and the facts tell us that these terms are customary in the musical industry, therefore further establishing that they would not be considered a material change. Therefore, the new terms become part of the contract.

Conditions, satisfied or excused. There are no conditions that the Seller must satisfy or that are excused from the Seller's performance; therefore the Buyer has an absolute duty to perform.

Defenses to formation. The **Statute of Frauds** requires that any contract be in a writing for the sale of goods of \$500 or more, signed by the party against whom enforcement is being sought. This is such a contract and the Statute of Frauds would require satisfaction. Seller is making a claim against Buyer. Seller's acceptance is in an email, which would constitute a writing. Buyer's offer is also in an email, which if it contained the Buyer's stationary header/footer or was sent using the Buyer's business email account, it would satisfy being a signed writing. Therefore the Statute of Frauds would be satisfied and **would not be a valid defense that Buyer could raise.**

Breach/Damages. The Seller will claim that Buyer breached the contract, and will seek **expectation damages.** Expectation damages aim to put the non-breaching party in the same position they would be had the contract been performed as expected, plus any consequential and incidental damages that may exist. The facts do not tell us of any consequential damages - those damages which would be reasonably foreseeable by the parties at the time of contract

formation. Nor are any incidental damages mentioned either. Here, Seller is expecting to be paid \$50,000, and would recover this amount from Buyer.

Non-conforming goods. Under the UCC, when a buyer receives non-conforming goods they can reject the goods at the time of delivery, or may accept them, and later revoke the acceptance and return the goods, if the non-conformity was not easily discoverable at the time of delivery. Buyer might claim that he is revoking his acceptance because he uncovers non-conformity in the quality of the guitars not readily discoverable at the time of his prior acceptance. Buyer might claim that the goods were non-conforming in quality, and that he could not have discovered this until two weeks later when his customers were not buying the Model A guitars and were buying other guitars instead. This would likely not be a viable defense to the breach. That buyers were buying different guitars does not speak to any non-conformity of the Model A guitars provided by Seller. If the jury were to find that Buyer was within his rights in deeming the guitars as non-conforming, the Seller would then be the party in breach. However, the contract expressly required that Buyer make this determination within 10 days of delivery.

Therefore, the court would find that the Buyer was in breach of the contract and would be liable to Seller for \$50,000.

ESSAY EXAM INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 3

Doug decided to kill Bob, the owner of a small grocery store, because Bob had twice falsely accused Doug of shoplifting. Doug went into Bob's store and killed Bob by shooting him twice with a handgun. After the shooting, Doug noticed the cash register, went over and opened it, and took all of the money out. Doug then saw a customer, Sally, hiding behind some shelves. He pointed the gun at Sally, took her purse, and tied her hands behind her back. Doug then heard police sirens and ordered Sally at gunpoint out of the store and into his car.

Officer Fran, who was responding to a report of gunshots at Bob's store, saw Doug speed out of the parking lot in his car. Officer Fran chased him for several blocks until Doug pulled into an empty parking lot. When he got out of his car, Doug fired several shots at Officer Fran, who responded by firing her gun at Doug. She missed Doug, but one of her bullets went through a window of the car and hit Sally, killing her. As Doug tried to run away, Officer Fran tackled him and knocked the gun from his hand. Doug got up and punched Officer Fran with his fist. Officer Fran then subdued and arrested Doug.

With what crimes can Doug reasonably be charged; what defenses, if any, may he reasonably raise; and what is the likely result? Discuss.

QUESTION 3: SELECTED ANSWER A

Crimes of Doug (D)

Homicide

Homicide is the killing of one human being by another.

Here, two people were killed, S and B.

M2 of B

Murder (M) 2 is Homicide plus Malice. Malice is shown by: intent to kill, intent to commit serious bodily harm, conscious disregard for the safety of others, intent to commit a felony.

Here, D decided to kill B, which is intent to kill. Therefore there is M2.

Here, there was no intent to commit serious bodily harm, or conscious disregard, or intent to commit felony when it came to the murder of B because the plan and intent was to kill B.

Murder 1 of B and S

Murder 1 is Murder 2 plus premeditation OR Felony M1.

Premeditation is the formation of and reflection on intent to kill.

Here, there is premeditation because D decided to kill B. He had a plan, and went into the store with that specific intention, and based on his reasoning that he had been accused of shoplifting. He had sufficient time to think about the plan and deliberate on it and the reasoning shows that he reflected and therefore it was premeditated.

Therefore M1 of B

Here, there was no premeditation in the killing of S because there was no deliberate formation of a plan and there was no intent formed or plan to kill S.

Therefore no M1 of S

M2 of S (see rule above)

Here, D did not intend to kill S or cause her serious bodily harm. He did intend to commit a felony (kidnapping and robbery - see below) and therefore there is M2. He also showed conscious disregard for the safety of others.

Conscious disregard for the safety of other is involuntary M2. It is shown because D knew or should have known his actions are a threat to human safety, an average person would have known these actions pose a threat to human safety, and base antisocial motive.

Here, D was shooting at a police officer. Shooting at another human being in the vicinity of other people is clearly endangering human life, which D knew or should have known, and any average person could appreciate the risk in that behavior. Shooting at a police while trying to escape and holding a person against their will is base antisocial behavior.

Therefore there is M2 of S.

Felony M1 (of S and B)

Felony M1 is a killing that occurs during the commission of a felony (before safety is reached), intent to commit inherently dangerous felony, independent and collateral to the felony, D must commit the killing (majority must be the actual cause, minority can be the proximate cause).

Here, there were two killings, the killing of S and the killing of Bob.

The killing of B was not independent and collateral of the felony, because the intent was to go in and kill B. Therefore, no felony M1 for the killing of B.

The killing of S was during the commission of an inherently dangerous felony (robbery or kidnapping - discuss below), because while D had reached the parking lot, it was still during the

chase/escape from police, he was still in the middle of an altercation with police from the felony, he still had S in the middle of her kidnapping with him, he had not yet reached safety, and therefore it was still during the felony. He had intended to commit the felony because he had voluntarily chosen to threaten S at gunpoint and then take her in his car. Killing was independent and collateral because his intent was not to kill S.

Majority rule - If the killing occurs by a person other than the perpetrator of the crime, the perpetrator is not responsible for another person's actions, and therefore no F1 murder.

Minority rule - D can be the proximate cause of the murder. Firing a gun at a police officer, it is foreseeable that someone would get killed. While it was not D's bullet that killed S, he is the proximate cause of her death; therefore, Felony M1

Deadly weapon Doctrine

Deadly weapon doctrine shows intent when a deadly weapon is aimed at a vital part of the body.

Here, D shot B with a weapon, but the facts do not state a specific part of the body.

Mitigate to Manslaughter for extenuating circumstances

Manslaughter for killing of (S)

Involuntary manslaughter is involuntary murder without malice but with recklessness.

Recklessness is shown by D knowing or should have known that his behavior poses unjustifiably high risk of death.

Here, D was shooting at a person, which he should have known is dangerous behavior which poses high and unjustifiable risk of death to a person in the vicinity. His shooting at the officer caused her to fire back. The bullets flying caused the death of S.

Therefore Manslaughter

The killing of B was intentional, not an unintentional homicide.

Voluntary Manslaughter - heat of passion

Manslaughter can be in the heat of passion. D is in the heat of passion, a reasonable person would be moved to kill, no time to cool off, causal connection between trigger and killing, intended to kill.

Here, D would argue he was in the heat of passion when he killed B because he was triggered when B accused him of shoplifting, which would move anyone to kill, that is the reason and the causal connection for killing D, and he intended to kill D. However, he had enough time to cool off from the times he was called a shoplifter to making the decision to kill and coming into the store with the planned killing of B. He was not in the store when he made his decision to kill, and he had enough time that it was not in the actual moment of heat of passion, he had enough time to cool off and reevaluate his plan, he made a clear decision to come into the store and kill.

Here, when S was killed, D had no intention of killing her, he was shooting at the police officer.

Therefore, no heat of passion for either S or B.

Attempted murder

Attempt is taking sufficient steps with the intent to commit the crime.

Here, D shot at the police officer. Shooting at a person is sufficient steps and shows intent to kill.

Therefore, attempted murder.

Burglary

Burglary is the wrongful breaking and entering into the dwelling of another at night with the intent to commit a felony therein (modernly don't need breaking and entering, doesn't need to be at night, doesn't need to be a dwelling).

Here, there was no wrongful breaking and entering because it was a store and there was permission to enter. There was intent to murder when he entered but did not intend to steal the money or the purse when he first entered.

Larceny (merges with robbery - see below)

Larceny is the wrongful taking and carrying of the possession of another with the intent to permanently deprive.

Here, D took all of the money out of the cash register of the store, which he did not have permission to take and did not belong to him, therefore there is wrongful taking and carrying. He also took S's purse, which did not belong to him, also wrongful taking and carrying. He took both the purse and the money wrongfully and did not intend to return them to the rightful owners.

Therefore larceny.

Robbery

Robbery is larceny with force or threat of force.

Here, there was larceny (see above) with threat of force because pointing a gun at S is threatening her with force.

Therefore there is robbery

Assault (merge with robbery)

Assault is the intentional act causing imminent apprehension of harm.

Here, pointing a gun at S is intentional and with the purpose of causing her fear of harm so that she hands over her purse.

Here, shooting in the direction of the police officer is intentional and also causing her fear of harm from the bullets.

Therefore Assault of S and the police officer.

Battery

Battery is an intentional act causing harmful or offensive touching

Here, D intentionally tied Sally's hands behind her back, which is offensive touching. (merge with robbery)

Here, D intentionally punched Officer F which is an intentional harmful touching of another.

Therefore, there is Battery of Officer and S

Kidnapping

Kidnapping is the confinement of a person with either movement or concealment.

Here, D confined S with handcuffs, and ordered her, while threatening her with a gun, to move her into his car, which is movement and confinement.

Therefore, there is kidnapping of S

False imprisonment

Unlawful confining someone within borders

Here, When D saw S in the corner, threatening S and putting handcuffs on her, is unlawful

confinement of S.

Therefore, False imprisonment

Self- defense

Self -defense is a reasonable and honest belief that there is an imminent threat and that force used is necessary and proportional.

D would argue that he punched the officer in self- defense because she was holding a gun which she was firing, and she tackled him, and therefore he was fearful for his safety at that moment and punching her was necessary and proportional to the force she was using in order to save himself.

His defense would fail.

QUESTION 3: SELECTED ANSWER B

Crimes of Doug

Murder

In order to be charged with murder of Bob, the State will need to first prove that a homicide occurred. *A homicide is the unlawful killing of a person.* Here, since Doug did not have the lawful right to kill Bob (discussed later), and because Bob is a person (since he falsely accused Doug reasonable to assume) and Bob died (killed Bob by shooting him twice) the State will have proven a homicide occurred.

Next the State will have to prove that Doug was in fact the *cause* of Bob's death. Here, the State can prove that Doug killed Bob by shooting him twice with a handgun. Therefore, the State will have satisfied the causation element.

Finally, the State will have to determine whether Doug committed Murder or Involuntary Manslaughter by showing malice/intent. Intent can be proven by (1) a conscious objective to achieve the act (2) an intent to create a serious bodily injury or (3) by a depraved heart reflected by gross and wanton recklessness the action did happen. Failing to be able to prove malice/intent will cause the State to consider Involuntary Manslaughter.

Here the State will be able to prove that Doug consciously intended Bob to die. The facts state that Doug was upset about Bob falsely accusing Doug of shoplifting on two occasions. The State will be able to further prove that Doug decided to kill Bill and that he went to Bob's store to kill him. Therefore the State has satisfied the malice/intent element.

What's left is for the State to determine whether to charge Doug with Murder 1, Murder 2 or Voluntary Manslaughter. To be charged with Murder 1 the State will have to show that Doug

murdered Bob *with premeditation and deliberation*, that he did so *with arson, bomb or lying in wait*, or that the act *occurred during the commission of an inherently dangerous felony*. For Murder 2, the State will need to show intent to *inflict significant bodily injury or wanton recklessness* and for Voluntary Manslaughter that the killing occurred *during the heat of passion or as a failed defense*.

Here the State will likely charge Doug with Murder 1. The State can show that Doug with premeditation and deliberation killed Bob. The State can show that Doug decided to kill Bob, that he went to the store, and that he shot Bob not once, but two times.

Doug will argue for Voluntary Manslaughter as he will argue that Bob's accusing him of shoplifting defamed and enraged him. This argument will likely fail as (A) words alone (i.e. accusations) are not sufficient to justify voluntary manslaughter and (B) deadly force is not a reasonable defense to defamation.

The State will likely charge Doug under Murder 1 and he will likely be convicted.

Robbery/Larceny of Bob's Money

In order to prove that Doug committed robbery of Bob's store when he took all the money out the State will need to show that Doug used *force or the threat of imminent force in order to deprive Bob of his rightful dominion* over the money. Since Doug went to the store to kill Bob, not take the money, the state will likely resort to charging Doug with larceny - defined as the *taking of another's possessions with the intent to permanently deprive*.

Here, the State can show that Bob was dead, and that at that point, Doug decided to take the money (noticed the cash register, went over and opened it and took all the money out), depriving Bob's store of all the money.

The State will likely charge Doug and get a conviction on larceny of Bob's money.

Robbery of Sally

As discussed above, to charge Doug with robbery, it must show that he used *force or the threat of imminent force to deprive another of their dominion over their possessions*, in this case, Sally.

Here the State can show that when Doug pointed the gun at Sally, and took her purse, Doug did indeed deprive Sally of dominion over her purse with force/the threat of force.

The State will likely be able to charge Doug and get a conviction for robbery of Sally's purse.

Assault of Sally

When Doug pointed the gun at Sally, he undoubtedly created in Sally *a reasonable fear of an imminent harmful or offensive touching*. Doug did so perhaps not with the specific intent of creating a fear, but he did intend to rob her, and that intent will transfer to this crime as well.

Here, when Doug pointed the gun at Sally and took her purse, he created a fear of being touched in a harmful way.

The State will likely charge Doug with assault of Sally and likely get a conviction.

Battery of Sally

To charge Doug with Battery - the State will need to prove that Doug committed the *intentional harmful or offensive touching of another*.

As discussed above, Doug's intent will transfer through the continuing crimes of robbery and assault to the Battery when he bound Sally's hand behind her back. A reasonable person would agree that being bound is offensive.

The State will likely prove the charge of battery of Sally and get a conviction.

False Imprisonment of Sally

To prove a charge of false imprisonment, the State will need to prove that Doug *unlawfully confined Sally with no reasonable means of escape.*

Here, Doug tied Sally's hands behind her back and as we know from earlier - pointed a gun at her, creating a fear that fleeing may result in death, Sally was prohibited from leaving- thus confined against her will, with no reasonable means of escape.

The state will likely sustain a charge and get a conviction of False Imprisonment.

Kidnapping of Sally

To prove a charge of kidnapping the State must show that Doug transported Sally against her will.

Here, the state can show that Doug ordered Sally at gunpoint out of the store and into his car. Because Sally moved from the store to the car, she has been transported (even under her own power) against her will (at gun point).

The State will likely sustain a charge and get a conviction on kidnapping.

Assault of Officer Fran

To prove a charge of assault (defined supra) against Officer Fran the State will be able to show that when Doug got out of his car and fired several shots at Officer Fran. He did create in Officer Fran an apprehension of being harmfully touched by an incoming bullet.

The State will likely charge Doug with Assault on Officer Fran and get a conviction.

Murder of Sally

In charging Doug for the murder of Sally, the State will need to go through the same analysis

(supra) as it did in the killing of Bob.

The State is likely to prove a homicide occurred in that Sally was killed.

When it comes to whether or not Doug was the cause of the homicide, the courts have evolved.

At common law a felon is guilty of murder even when a victim or co felon is murdered by the actions of a police officer or another victim/bystander. Under the Modern Penal Code, the courts have held that victims that die as a result of police or bystander actions - the original perpetrator is NOT guilty.

If the courts follow the common law, the state will be able to show that Doug did murder in the first degree Sally under the Felony Murder Rule (during the commission of an inherently dangerous felony), during the ongoing commission and fleeing of murder of Bob and the robbery and kidnapping of Sally.

If the courts follow the MPC, the State may be challenged to prove the causation.

If the courts lean towards the MPC, the State may consider charging Doug with Murder 2 because Doug was engaged in wanton negligence by engaging in a gun battle with Officer Fran with Sally still in the car.

Failing the ability to prove the causation, the State may have to consider charging Doug with involuntary manslaughter for Sally's death. The requirements for involuntary manslaughter are causing a death during the commission of a misdemeanor or with reckless negligence.

The state will have to decide on that charge and subsequent likelihood of conviction of Doug for Sally's death depending on their local court's leaning.

Battery of Officer Fran

To prove a charge of battery (defined supra) against Officer Fran, the State will be able to show

that when Doug punched Officer Fran with his fist, he did so under his own volition and committed battery.

Doug may try to argue that he was justified in self- defense when he punched Officer Fran because she had just tackled him and knocked the gun from his hand. That argument will fail as police have a lawful right of authority to detain suspected perpetrators of crimes. Doug's justification of self- defense would only apply if Officer Fran had unlawfully touched him in a harmful or offensive manner. In the case under the color of authority, that defense will not stand.

The State is likely to make the charge and get a conviction for battery on Officer Fran.

ESSAY EXAM INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

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If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 4

Woody lived in a cabin in a rural neighborhood. Woody had an outhouse that created an offensive odor. Woody decided to install an underground septic system so that he could have an indoor bathroom.

Woody discovered that the septic system he planned on installing would not fit on his land and that a portion of the system would have to extend underneath Neighbor's vacant lot, which was situated next to Woody's property. A fence had once stood on the property line between the two lots, but all that remained were some broken fence posts.

Since Woody knew that Neighbor was overseas for a year, he decided to install the septic system during Neighbor's absence. He hired Chuck, an independent licensed contractor, to do the installation.

During construction, Chuck saw the broken fence posts and suspected that they marked Woody's property line. He told Woody that a part of the septic system, if installed, would end up underneath the adjacent lot. Woody scolded Chuck for talking too much and then demanded that Chuck cut down the maple tree on Neighbor's lot to make room for the septic system. Because Chuck needed the work, he cut down the tree, dug up the ground, and installed the septic system. Woody later burned the wood from the tree as firewood because he liked the ambiance burning wood created.

Neighbor returned from overseas and discovered what Woody and Chuck did to his vacant lot and his maple tree. Neighbor sued Woody and Chuck for damages.

1. What tort claims can Neighbor reasonably raise against Woody and Chuck; and what defense(s), if any, can each or both of them reasonably make? Discuss.
2. If Neighbor prevails against Woody and Contractor, what damages may Neighbor receive and how should such damages be apportioned? Discuss.

QUESTION 4: SELECTED ANSWER A

1. TORT CLAIMS AGAINST WOODY AND CHUCK

NEIGHBOR v. WOODY

Vicarious Liability - Respondeat Superior

Under the doctrine of respondeat superior, the **employer will be held liable** for the **torts of his employees**, and will be found liable for the torts of his **independent contractors** if the **contractors were acting under the direction of the employer** and were not free to act independently from the employer's direction.

Woody hired Chuck, an **independent, licensed contractor** for the installation work of Woody's septic tank. Woody will be held **vicariously liable** for the torts committed by Chuck, if they were under the **express direction** given by Woody and if the acts were done for Woody's benefit.

The doctrine of vicarious liability will apply to Woody.

Trespass to Land

Trespass to land is the **intentional coming onto property** in the **possession of another without privilege or consent**.

Woody hired Chuck, an **independent contractor** to install a septic system and to remove a maple tree to make room for the septic system, all of which **Woody was aware** required **coming onto the property** of Neighbor. Woody may argue that the property was vacant and not being used; however, his argument will fail because the **property belonged to Neighbor** and, thus, was in **Neighbor's possession**. Further, Woody was very much aware of **where the division of the property line** was because he otherwise **would not have contemplated** having

to go under Neighbor's land to install the septic tank.

That Woody intended for the septic work and tree removal to be done **while Neighbor was overseas** for a year, demonstrates that Woody **desired the work** to be completed **without Neighbor's knowledge**, thus **without privilege or consent**.

On the other hand, Woody will argue that he did not **personally trespass** upon Neighbor's land, that it was Chuck. However again, this argument will fail if it is shown that **Woody instructed Chuck to go onto Neighbor's land**, which is the **use of an innocent agent** to carry out the actions that the primary tortfeasor (Woody) intends to commit. Further, since Chuck acted under demand required by the **scope of his employment**, liability will vicariously extend to Woody.

Woody will be vicariously liable to Neighbor for trespass to land.

Trespass to Chattel

Trespass to chattel is the **intentional and substantial interference of another's right to his personal property**.

Woody intended for the maple tree upon Neighbor's property to be removed to make room for the septic tank as suggested by Chuck. Woody **instructed Chuck** to cut down the maple tree, which Chuck eventually did **creating a substantial interference** with the **personal property** of Neighbor.

Woody may argue that **Chuck had inferred that the tree would need to be removed** to make room for the septic tank, however, Chuck will argue that he was **not sure** of where the **property lines were drawn** and that Woody **ultimately demanded removal** of the tree. Moreover, Woody was **well aware** of where the property line was located, discussed, supra.

Woody will be vicariously liable to Neighbor for trespass to chattel of the maple tree.

Conversion

Conversion is the **intentional assumption of dominion and control** of the **personal property** of another which **substantially interferes** with their **property rights**.

Woody later burned the wood from the felled maple tree which belonged to Neighbor as it was his **personal property**. Woody burned the wood because he liked the ambiance burning wood created and thus it was his **intent and desire** that the wood be burned which was Woody's **assumption of dominion and control** over the maple tree that belonged to Neighbor, and resulting in the **permanent dispossession** of the tree from Neighbor.

Woody will be liable for the conversion of the maple tree.

NEIGHBOR v. CHUCK

Trespass to Land

Defined, supra.

Chuck was required to go onto the land of Neighbor to perform the septic work and to cut down the large maple tree. Chuck's **coming onto Neighbor's land** was **volitional**; thus it was **intentional**.

Chuck will argue that he **did not know** exactly where Neighbor's property line started and so cannot be held to **intending his act occur on Neighbor's land**. However, Neighbor will argue that Chuck **need not know whether the land upon which he stood belonged to another**. It is **sufficient** that Chuck **intended to place himself upon the portion** of property regardless of in whose possession the property was.

Further, Neighbor will argue that Chuck **at least suspected** where the property lines fell, and

that will **impute his knowledge**, even though **knowledge is not required**.

Chuck will be liable for trespass to land.

Trespass to Chattel

Defined, supra.

Chuck felled the maple tree by the instructions of Woody and again, will argue that he did not know that the land upon which the maple tree was located belonged to Neighbor.

Neighbor will argue the same, that it was sufficient for Chuck to at least suspect that the property line did indicate where Neighbor's land began, and thus was sufficient to impute knowledge and thereby Chuck's intent to fell the maple tree that was in the **possession of Neighbor** and which **substantially interfered** with Neighbor's **rights to his tree**.

However, Chuck will counter that although he may have suspected, it was not known and the threshold for trespass to chattel is that he knew the maple tree is the chattel of another.

Chuck will not be liable for trespass to chattel.

2. DAMAGES

General Damages

General damages are those that flow naturally from the tortious act and will compensate the plaintiff for any pain and suffering.

Since the acts occurred while Neighbor was away, he will recover damages for that which caused him pain and suffering.

Neighbor will recover general damages.

Special Damages

Special damages are pecuniary in nature and will be awarded to compensate the plaintiff for the direct result of the tortious act.

Neighbor can recover the replacement value of what a maple tree cost at the time the maple tree was felled.

Neighbor can recover the cost of having the septic tank removed, should he desire to do so.

Neighbor will be awarded special damages.

Equitable Relief

Equitable relief will be awarded where the **legal remedy is insufficient**, and where there **appears to be a continuing tort**. Equitable relief will be awarded to **prevent the multiplicity of suits** for the same tort.

In the event that the septic tank cannot be removed, the court may grant equitable relief and order that Woody pay for the **reasonable daily rental value** for using the portion of Neighbor's land under which his septic tank is located.

Since it would not be likely that the septic tank be removed, indeed because then Woody would be responsible for a private nuisance for the offensive odor coming from his outhouse, Neighbor would have the ability to **bring multiple suits for continuing trespass** of the septic tank.

However, it would depend on the **cost/benefit analysis** and which would be more fair to both parties overall. If it is reasonable to pay a daily rate versus the cost of removing the septic tank and having another one installed that would not trespass onto Neighbor's land.

Neighbor may seek equitable relief.

Joint and Several Liability

Joint and several liability will be imposed upon multiple or concurrent tortfeasors for a tortious act which caused the plaintiff's injuries.

Here, Woody will be held **jointly and severally liable** for the torts of Chuck, which are trespass to land, and trespass to chattel. Plaintiff can collect against Woody for all of the damages, or from Chuck.

Indemnification

A party may seek indemnification from another if it can be proved that one party was not responsible for the actual tort committed by the other tortfeasor.

Here, Woody will seek indemnification from Chuck for trespass to land and trespass to chattel because although Woody did intend for those torts to occur, he did not actually commit them, and therefore should not bear the majority of the damages.

However, Chuck will argue that he should be indemnified for the damages to Neighbor because Woody ordered Chuck to commit all of the torts against Neighbor. Indeed, Woody was aware of the property lines and the instructions he gave to Chuck were made with such knowledge. Further, Chuck did not act outside the scope of Woody's demands, nor did he act independently from Woody's instructions.

Ultimately, Woody will be found completely liable for Chuck's torts.

QUESTION 4: SELECTED ANSWER B

1. What torts can Neighbor reasonably raise against Woody and Chuck and what defenses can each or both reasonably make?

Trespass to land. Trespass to land is an intentional tort which occurs when a defendant enters upon the land of another person without permission and lacking any legal justification. The damage from trespass to land is to the possessory interest in the land, in addition to any subsequent physical damages that may occur to the land. Here, Woody and Doug acted in concert when they trespassed onto Neighbor's land to install a septic system. While the facts tell us that Woody and Chuck were aware that they were trespassing onto Neighbor's land, it is not necessary that the defendants actually knew that they were trespassing or not, as long as they were volitionally on the land of another, which the facts tell us, and there existed no justification nor permission from the landowner. **Therefore Neighbor can reasonably raise a tort claim of trespass to land against Woody and Chuck.**

Willful and wanton conduct. Woody and Chuck were well aware that they were trespassing. Woody was aware that the remains of the fence marked the border of the neighbor's property, and Chuck suspected this was the case as well. When Chuck brought this issue up to Woody, Woody scolded Chuck for talking too much, making it even more known to Chuck, or at least making Chuck substantially certain, that he was trespassing onto the land of another.

Conversion. Conversion is the intentional act which causes the destruction of, or substantially interferes with, the personal property of another, effectively permanently depriving the possessor of the property, rendering the tortfeasors liable for the full market value of the

property. Here, Woody and Chuck cut down the maple tree from Neighbor's land. Not only did they cut it down, they subsequently burned the wood in a fire, destroying it completely and permanently depriving Neighbor of the tree. Woody and Chuck would be liable to Neighbor for the fair market value of the maple tree at the time they cut it down.

Trespass to chattel/conversion of fence/posts. Trespass to chattel occurs when a defendant significantly interferes with the personal property of another. The facts tell us that Woody and Chuck installed a septic system that spanned from Woody's property into Neighbor's vacant lot. If the remaining fence posts that marked the property line belonged to Neighbor, and if they were moved/removed during this construction project—which seems likely—then Neighbor can reasonably raise a claim of intentional trespass to chattel against Woody and Chuck for any damage to the fence/posts. If the fence/posts were removed and disposed of, permanently depriving Neighbor of them, then Woody and Chuck would be reasonably liable for the **conversion of the fence/posts**, rather than simply trespass to chattel.

Private nuisance. Private nuisance occurs when a defendant causes a substantial and unreasonable interference with the private enjoyment of a plaintiff's land. Unlike a physical trespass, private nuisance is often caused by foul odors, loud noises, etc. If the foul odor of Woody's outhouse made its way onto Neighbor's land, and Neighbor was aware of and unreasonably affected by foul odor, to the extent that any reasonable person in the community would also be substantially and unreasonably affected, then Neighbor would have a claim for private nuisance against Woody, the landowner of the outhouse.

Defenses. Private necessity defense. Woody might try to raise a defense of private necessity, that he was forced to choose the lesser of two evils and to trespass onto Neighbor's land to prevent a harm to himself or his property from the outhouse's foul odor. A foul odor emitting

from his outhouse would not constitute the risk of physical harm to Woody's person or property to allow for a private necessity defense to these intentional torts. This defense would fail, and there are no other defenses available to Woody.

Chuck might claim that he was acting as an unwitting agent of Woody's, though knowledge of actually trespassing onto the land of another is not required, only that the act of the trespassing be volitional, which the facts tell us. The facts also tell us that Chuck was aware of the trespass and other tortious conduct but for his own needs, needing the income, he committed the acts regardless. Chuck would have no valid defense.

However, were Chuck not aware of any trespass and if he could convince a jury that he was acting solely on Woody's orders, unaware of any transgression to the neighbor's property, Woody could possibly be held vicariously liable under the doctrine of respondeat superior. Under respondeat superior, an employer can be held liable for the tortious, or criminal, conduct of their employee when acting within the scope of their employment. Here, though, the facts tell us that Chuck was a contractor, not an employee, and therefore the doctrine of respondeat superior would not apply and Woody would not be vicariously liable for Chuck's conduct. Woody would, still, remain directly liable for the tortious conduct he exhibited in concert with Chuck.

2. If Neighbor prevails against Woody and Contractor, what damages may Neighbor receive and how should such damages be apportioned?

Damages for trespass to land, conversion and trespass to chattel would be **compensatory damages** for the trespass to the possessory right to the land, as well as any actual damages to the land, the fair market value of the tree. Neighbor would recover for the cost of removing the septic system and returning his land to its original condition, as well as any pain and suffering or

other damages that may have occurred during this construction project.

Also, **punitive damages** may be available to Neighbor, if he can establish that Woody and Chuck acted willfully and wantonly when they committed these above mentioned torts. The facts tell us that Woody, as well as Chuck, did act purposefully and with the willful intent to commit these torts, without any valid justification, and therefore punitive damages may be recoverable by Neighbor.